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Evidence -- Presumptions and Burden of Proof -- Agency -- Motor Vehicles -- Identifying Markings

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tions to the jury, this result still does not answer the important questions that arise in the area of former jeopardy. Perhaps the General Assembly may see a need to revise our law of principals and accessories, as numerous other legislatures have done.[30] A clarification is needed to remove the state of uncertainty that now exists.

WILLIAM R. HOKE

Evidence—Presumptions and Burden of Proof—Agency—Motor Vehicles—Identifying Markings

In 1947 the North Carolina Supreme Court in *Carter v. Thruston Motor Lines Inc.*,[1] held that proof of identifying markings on a commercial vehicle, taken in conjunction with adequate evidence of negligent operation of the vehicle, was not sufficient to sustain the necessary inferences of ownership, agency, and scope of employment[2] to make out a prima facie case of respondeat superior liability against the party suggested by the markings as being the owner. A note writer in this *Review* at that time[3] suggested that the difficulties of proof frequently confronting plaintiffs in respect of ownership, agency, and scope, as illustrated in that case, might well justify judicial adoption of a rule by which the master-servant relationship and scope of employment would be inferred from proof of ownership. The court did not do so, but the legislature in 1951 enacted such a rule in G.S. § 20-71.1,[4] which contained the additional element of inferring ownership from proof of registration.

Whatever the intention of the legislature, the language of this statute, that proof of the basic facts of ownership or agency shall "be prima facie evidence" of the inferred essential facts invoking vicarious liability, has proved a somewhat illusory weapon for plaintiffs. Since it is couched in the language of prima facie evidence, and not of presumption, and since it does not in terms shift the burden of proof to the defendant, it has quite predictably[5] been construed to have no

[30] See statutes cited notes 13 and 14 *supra*.

[1] 227 N.C. 193, 41 S.E.2d 586 (1947).

[2] Scope of employment will hereafter be referred to as "scope."

[3] Note, 25 N.C.L. REV. 491 (1947).

[4] N.C. GEN. STAT. § 20-71.1 (1953).

[5] Interpretative difficulties are inevitable whenever a statute uses the terms "prima facie evidence," or "presumption," without further directive as to what if any effect is intended to be had upon pleading burden, burden of proof, and probative force by virtue of the operation of statutory prima facie evidence or presumptions. There is no unanimity as to (1) the distinctions, if any, between prima facie evidence and presumption as concepts; (2) their

other effect than to provide immunity against a motion to nonsuit at the conclusion of plaintiff's evidence.[6] It does not have the effect of shifting to defendant any more than the administrative burden of going forward with the evidence.[7] Upon the offering of uncontradicted evidence which directly opposes the inferred facts of agency and scope, the defendant is entitled to a peremptory instruction[8] in

effect upon the burden of proof when only these terms are used; (3) what probative force, if any, is created thereby for jury consideration. See generally Gausewitz, *Presumptions,* 40 MINN. L. REV. 391 (1956); McBaine, *Burden of Proof: Presumptions,* 2 U.C.L.A.L. REV. 13 (1954).

On the first point, Wigmore criticizes the widespread synonymous usage of the terms prima facie evidence and presumption in the interest of accurate terminology and clear doctrinal analysis. 9 WIGMORE, EVIDENCE § 2494 (3d ed. 1940). The North Carolina court has equated "presumption of fact" with prima facie evidence, both as to constituent elements and as to consequences. See, *e.g., In re* Will of Wall, 223 N.C. 591, 27 S.E.2d 728 (1943). But this court also recognizes and applies a "presumption of law," which has different consequences in the material respects herein noted from the presumption of fact, or prima facie evidence. See, *e.g., In re* Will of Wall, *supra.*

On the second and third points, two "schools" with powerful protagonists have evolved. The Wigmore position, following Thayer, is that the burden of proof in the ultimate sense "never shifts" by virtue of even a "true" presumption's operation. 9 WIGMORE, EVIDENCE § 2489 (3d ed. 1940). On the other hand, Professor Morgan takes the position that a true presumption should shift the risk of non-persuasion and require a meaningful instruction to that effect to the jury. MORGAN, BASIC PROBLEMS OF EVIDENCE 17-41 (1954). UNIFORM RULE OF EVIDENCE 14, reflecting influence from both schools, announces a hybrid approach by which the ultimate burden shifts only if the basic facts of the presumption "have any probative value as evidence of the presumed fact." The basic divergence is reflected among various courts. The North Carolina court, following its conceptual distinctions, has traditionally held the "presumption of law" to effect a shift of the risk of non-persuasion and require an instruction to that effect, but has denied these consequences to the "presumption of fact." See generally Speas v. Merchants Bank & Trust Co., 188 N.C. 524, 125 S.E. 398 (1924); McCormick, *Charges on Presumptions and Burden of Proof,* 5 N.C.L. REV. 291, 295-97 (1927). Thus, judicial announcement in a North Carolina opinion of approval of a "presumptive rule" can be followed in the same opinion by a rejection of a "presumptive rule" in favor of a "prima facie rule" with no illogic if the first presumptive rule is understood to refer to a presumption of fact and the second to a presumption of law. Unexplained, such a juxtaposition is ambiguous and misleading. See note 18 *infra.*

[6] Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961). Although the statute has only the limited effect pointed out in text, it must be kept in mind that prior to its passage plaintiffs on this proof in this type of case had no chance of getting to the jury. See Carter v. Thurston Motor Lines, Inc., 227 N.C. 193, 41 S.E.2d 586 (1947) and text at note 1.

[7] Knight v. Associated Transp., Inc., No. 171, N.C. Sup. Ct., October 10, 1962.

[8] Travis v. Duckworth, 237 N.C. 471, 75 S.E.2d 309 (1953). "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its

his favor as a matter of right[9] even absent any special request.[10]

In a recent case[11] plaintiff, suing the owner of a tractor-trailer unit for damages for personal injuries sustained in a highway collision, offered as sole proof of ownership, agency, and scope of employment, identifying markings which suggested defendant's ownership. Held, that this evidence constitutes prima facie proof of ownership, agency, and scope, but does not shift to the defendant the burden of proof in the ultimate sense of the risk of non-persuasion.[12]

Since G.S. § 20-71.1 was not in play in this case because of failure to comply with the then applicable one year provision,[13] this decision, expressly overruling *Carter v. Thruston Motor Lines Inc.*,[14] makes available a new method, independently of that statute,[15] for supplying

existence even though he offers no evidence tending to contradict that offered by plaintiff. A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. [Citations omitted.] Such an instruction differs from a directed verdict as that term is used by us. A verdict may never be directed when the facts are in dispute. The judge may direct a verdict only when the issue submitted presents a question of law based upon admitted facts." Chisholm v. Hall, 255 N.C. 374, 376-77, 121 S.E.2d 726, 728 (1961). It might be considered that plaintiff still has received substantial aid from the statute since defendant must produce evidence to justify the peremptory instruction, and since presumably the plaintiff, though unprepared to meet it, is protected as to its truthfulness by the sanction of perjury. This sanction may well be a weak reed considering the frequently shadowy line between agency and bailment. See Travis v. Duckworth, *supra*.

[9] Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959).

[10] In further clarification of the statute's effect it was held to establish a mere rule of evidence and not to eliminate the necessity of pleading both agency and negligence. Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954).

[11] Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961). The result reached in the principal case is in accord with the weight of authority. *E.g.*, Barber Pure Milk Co. v. Holmes, 264 Ala. 45, 84 So. 2d 345 (1955); Robinson v. Greyhound Lines, Inc., 257 Ill. App. 278 (1930). See generally Annot., 25 A.L.R.2d 167 (1952).

[12] The trial judge, considering that Virginia law as to the burden of proof applied in view of the Virginia locus of the collision, charged the jury, in correct application of Virginia law, that the effect of this evidence was to shift the burden of proof in the ultimate sense to the defendant. This was held error for the *lex fori* rather than the *lex loci* applies to these "procedural matters." The court then rejected the Virginia rule in favor of that pointed out in text.

[13] N.C. Sess. Laws 1951, ch. 494 removed by N.C. Sess. Laws 1961, ch. 975.

[14] 227 N.C. 193, 41 S.E.2d 586 (1947).

[15] Presumably, in a similar case arising where G.S. § 20-71.1(a) could be invoked, a more or less academic question could be presented as to the mechanics of operation of the rule of *Knight* within the framework of G.S. § 20-71.1(a). That is, will evidence of identifying markings supply the proof of ownership contemplated by G.S. § 20-71.1(a) so as thereupon to invoke the operation of that statute, to create a "prima facie case" by its very terms,

the hiatus in available proof of ownership, agency, and scope.[16] But it was soon made clear that this method is to be of no greater service to plaintiffs than are the inferences allowed by G.S. § 20-71.1, as construed. For, on new trial of the *Knight*[17] case, the trial court was held to have committed error when it charged the jury in effect that the prima facie rule announced on first appeal had the effect of shifting the burden of proof in the ultimate sense to the defendant.[18]

It may well be that the legislature intended by G.S. § 20-71.1 to favor the plaintiff's over-all chances of success in this type case in a more substantial way than merely to provide nonsuit immunity

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or, will the rule of *Knight* continue to operate independently of that statute, as it did in the *Knight* case? That this is a purely academic speculation is indicated by the point, developed in text, that the prima facie rule of *Knight* is perfectly corollary to the prima facie rule of the statute as interpreted.

[16] It is interesting to note although the statute does not go as far as the court was asked to go in *Thurston* the court in *Knight* went beyond what the statute provided by inferring agency and scope solely from identifying markings without necessity of proof of ownership or registration.

Quaere whether the judicial extension of *Knight* raises a constitutional question. If in a subsequent case the court determines that the judicial inference of *Knight* is in effect provided for in the statute such a decision might well run into the settled rule that in order for a statutory presumption to be held valid there must be some "rational connection" between the fact to the proof of which the presumption is attached and the ultimate fact to be established. Mobile J. & K.C. R.R. v. Turnipseed, 219 U.S. 35 (1910). The judicial extension moves proof of the necessary basic fact on which the inferences are predicated one step further back from the critical fact of agency. McCormick is of the opinion that statutory presumptions in regard to civil cases will not be straight-jacketed to the extent that presumptions in criminal cases are. McCormick, Evidence § 313 (1954).

[17] Knight v. Associated Transp., Inc., No. 171, N.C. Sup. Ct., October 10, 1962.

[18] Any confusion in the trial judge's instructions may fairly be traced to some rather ambiguous language in the first *Knight* opinion in referring to presumptions and prima facie cases: "In our opinion, the presumptive rule, which is generally recognized throughout this country, is a just one, and well-nigh necessary if those who happen to be injured by the negligent operation of such equipment are to have the protection to which they are justly entitled. Therefore, we hold that the evidence of the plaintiff in the trial below was sufficient to make out a prima facie case, and the defendant's motion for judgment as of nonsuit was properly overruled. However, since the court below used the Virginia presumptive rule in charging the jury, and we now are adopting the prima facie rather than the presumptive rule, we think the defendant is entitled to a new trial, and it is so ordered." Knight v. Associated Transp., Inc., 255 N.C. 462, 467-68, 122 S.E.2d 64, 69 (1961).

When the court in the first *Knight* opinion distinguished between prima facie cases and presumptions, it failed to make its further traditional distinction between presumptions of law and of fact. See note 5 *supra*. Presumably, the court sought to distinguish the presumption of law, not the presumption of fact, from the prima facie case on the ground that the former shifts the burden of proof in the ultimate sense. Failure to maintain and reiterate this doctrinal analysis in which two kinds of presumptions are recognized can lead to the confusion indicated by the trial judge's instructions.

upon proof of the basic facts of ownership or registration. If so, experience has demonstrated that the only way to accomplish this with certainty is by a statutory provision expressly placing upon the defendant the burden of proof in the ultimate sense.[19]

Until such time as a change of this type is made plaintiffs' counsel must realize that exclusive reliance on either the inference created by the present statute or the judicial inference adopted in the *Knight* case is apt to lead into a trap. The total effect of either inference is merely to take the plaintiff past a possible nonsuit at which point it vanishes leaving him naked in respect of evidence to substantiate his claim and open to an adverse verdict via a peremptory instruction in favor of the defendant.

The best weapons with which a plaintiff's attorney can arm himself to combat the problem of adducing ultimately effective proof on these frequently elusive elements are not the statutory inference nor the judicial inference of *Knight,* but rather, extensive investigation to discover more direct evidence of the ultimate facts of agency and scope, pleadings[20] designed to force admissions of both agency and

[19] Massachusetts has a statute which in terms goes beyond the mere creation of a prima facie or presumptive rule to specify that the result of the prima facie case of agency and scope made out shall be to shift the burden to the defendant as an affirmative defense. MASS. ANN. LAWS ch. 231, § 85A (1956). If a policy decision is made that more drastic leverage should be given plaintiffs in respect of their ability to adduce ultimately effective proof on these elements, this type statute must be used to insure the critical aspect of shifting of burden of proof.

[20] Good technical drafting and the code itself require that allegations of each material fact be separately stated. N.C. GEN. STAT. § 1-122 (1953). This may frequently force admission of the critical facts of agency and possibly scope, whereas if the same allegations are lumped in with other allegations, a defendant may frequently, by use of a negative pregnant form of denial, avoid admission with impunity.

The principal case would appear to furnish a rather good example of pleading in a manner which increases the probability of the defendant's use of a negative pregnant form of denial which, if unchallenged, successfully avoids having to deny directly under verification the narrow facts of ownership and agency. In a single paragraph the complaint alleged ownership, agency and scope and all the facts leading up to the accident. The corresponding paragraph in the answer reads: "The defendant denies that a tractor-trailer unit, owned by it and being driven by one of its employees in the course of his employment in a southerly direction on U.S. Highway #306, negligently and carelessly crossed the center line of said highway and struck the left fender of the tractor-trailer unit in which the plaintiff was riding and continued to strike the left side of the tractor and trailer, thereby knocking the plaintiff violently about the cab of said tractor, resulting in serious and painful injuries to the plaintiff, or that a vehicle of the defendant collided in any way with the truck in which the plaintiff was a passenger; that as to the other allegations of paragraph III of the complaint, this defendant has no knowledge or information sufficient to form a belief as to the truth

scope, and extensive use of the available discovery procedures.[21] In view of the fact that in some instances even the combination of extensive investigation and artfully drawn pleadings and discovery procedures may not supply the ultimately effective proof of these elements, a statute expressly shifting the burden of proof to defendant may be required.

MACK B. PEARSALL

Federal Income Taxation—Alimony and Support Payments—Effect of Contingent Reduction Provisions in Property Settlements

The 1961 decision of the United States Supreme Court in *Commissioner v. Lester*[1] provides for simplicity of interpretation and certainty of tax consequences where property settlement agreements incident to divorce or separation are subject to contingent alteration. Prior to 1942, a taxpayer who was divorced or legally separated from his wife was generally not entitled to deduct alimony from gross income.[2] The Revenue Act of 1942[3] changed this by requiring a wife[4] to include in gross income "periodic" payments received from her husband made in discharge of a marital duty.[5] A complimentary

or falsity of the same, and the same are therefore denied." Record, p. 4, Knight v. Associated Transp., Inc., 255 N.C. 462, 122 S.E.2d 64 (1961). Conceivably, if the plaintiff had alleged ownership, agency, and scope in separate paragraphs an admission of one or more then might have been forced.

[21] N.C. GEN. STAT. §§ 1-568.1-.27 (1953).

[1] 366 U.S. 299 (1961), *affirming* 279 F.2d 354 (2d Cir. 1960), *reversing* 32 T.C. 1156 (1959).

[2] Douglas v. Willcuts, 296 U.S. 1, 8 (1935); Gould v. Gould, 245 U.S. 151, 153 (1917). Alimony was deductible from gross income when the divorce decree, settlement agreement, and state law operated as a complete discharge of liability for support. Helvering v. Fitch, 309 U.S. 149, 156 (1940); Helvering v. Fuller, 310 U.S. 69 (1939).

[3] 56 Stat. 798 (1942).

[4] For purposes of simplicity it is assumed the husband is paying alimony or support; however, the statute covers a situation in which a wife is required to pay alimony to the husband. Elinor Stewart Sokol, 7 T.C. 567 (1946); Int. Rev. Code of 1939, § 3797(a)(17) (now INT. REV. CODE OF 1954, § 7701(a)(17)).

[5] Int. Rev. Code of 1939, § 22(k), added by ch. 619, 56 Stat. 816 (1942) (now INT. REV. CODE OF 1954, § 71), provided "periodic payments . . . received . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under . . . a written instrument . . . shall be includible in the gross income of such wife . . . . This subsection shall not apply to that part of any such periodic payment which the terms of the . . . written instrument fix, in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband."